IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1947.

Nos. 507 and 508.

SAMUEL LEONARD BERENBEIM, PETITIONER,

v.

UNITED STATES OF AMERICA.

BEN SCHECHTER, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

REPLY BRIEF OF PETITIONERS.

The government correctly states on page 15 of its brief that in the trial court the jury was instructed that the effective date of the insurance for guarantee purposes was the date on the face of the policy. But the Circuit Court held to the contrary. (See page 13 of our original brief.) So as we pointed out in our original brief the conviction was affirmed on a different legal theory from that submitted to the jury.

Apparently, the government now for the first time in the course of this litigation appreciates that petitioners are not responsible for the statements made in the insurer's report, form 381,—this for the reason that this report was made by the A. O. U. W. and petitioners had nothing to do with it. (Pages 16-18 of our opening brief).

In both the District Court and in the Circuit Court it was said that the insurer relied on statements made by petitioners in form 380. This we have shown was not the case. Now the government says petitioners are conveniently trying to disregard form 380, i. e., the application for benefits. The point the government overlooks is that form 381, a document for which we are in no wise responsible was offered against us and considered heavily against us in both the trial and circuit courts. We dispute that there were any false statements in form 380. The government's theory in the trial court was that form 380 gave false information because at the time that it was actually signed the soldier had not been inducted, but the undisputed fact is that *at the time form 380 was sent to the Veterans Administration* and brought within the cognizance of the Veterans Administration, the soldier was actually inducted.

It is established by abundant authority that the truth of a written statement must be determined in the light of the facts that existed when the statement is submitted for consideration. Up to that time it could have no vitality. (See original brief, pages 28-29).

The government recognizes that it is necessary to have some false statement for which petitioners are responsible upon which to hang its case, and accordingly on pages 8 and 9 of its brief says:

> "In filling in the form the agent falsely stated that a premium had been paid more than thirty days before the insured entered the armed forces * * *"

This is not supported by the record. Form 380 called for the due date of the last premium paid (see, e. g., R. 938). Petitioners filled this in by inserting the first day of the month, which was the due date for all premiums according to the rules of the A. O. U. W. This was pursu-

ant to the rules of the A. O. U. W. and not because of any fraud on the part of petitioners.

The premium date was invariably fixed by the A. O. U. W. as the first day of the month (see tabulation, pp. 33-37 of opening brief). As the Solicitor General states, the District Court held that this antedating did not make the policy ineligible for government guarantee. The Circuit Court of Appeals departed from this and the Solicitor General does likewise. The statement on page 8 of the government's brief that in each case petitioners dated "the *application* as of the first day of the month * * *" is contradicted by the Record (see tabulation, pp. 33-37 of our opening brief).

Nor does the evidence support the contention of the government that form 380 was false because of the statement that the policy was in the possession of the beneficiary. The most that can be said is that several of the veterans testified that their parents had mentioned that they had not received the policy, but this was merely hearsay (e. g. R. 234). Others testified they had received the policies (R. 249, 325, 654, 658, 659 and 663). Furthermore, the trial court instructed the jury and properly so that whether the policy was in possession of the beneficiary was immaterial. The controlling thing is that the A. O. U. W. in Form 381 with respect to all of these policies stated that they were in force and that the premiums had been paid and gave the dates on which the premiums had been paid.

The records of the A. O. U. W. show that all premiums had been paid and the date on which each premium had been paid was at least thirty days prior to induction (pp. 33-37, opening brief).

The government on page 24 of its brief urges that our objection to the instruction which placed the burden of proof upon petitioners as to good faith is technical. We respectfully disagree and suggest that it is a basic principle of American criminal jurisprudence. It is the important distinction between the jurisprudence of this country and that of continental Europe. Even if the other instructions of the Court did properly place the burden of proof where

it belonged, the challenged instruction manifestly did not. Prejudice that inheres in a charge that is definitely erroneous upon an important principle of law is not neutralized by a general instruction correctly stating the law. As pointed out in our opening brief this instruction was given separately from the previous instructions. It was the last word of the trial judge, and would have more influence with the jury than the previous general instructions (Bollenback v. United States, 362 U. S. 607).

Respectfully submitted,

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